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In the

Supreme Court of the United States

STACY FRY, BRENT FRY, and EF, a minor, by her next friends STACY FRY and BRENT FRY,

Petitioners,

vs.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AUTISM SPEAKS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	
I. PARENTS' OPPORTUNITY TO AVAIL THEMSELVES OF RELIEF THAT IS AVAILABLE ONLY UNDER THE CONSTITUTION, ADA, SECTION 504, OR OTHER FEDERAL LAWS PROTECTING THE RIGHTS OF CHILDREN WITH DISABILITIES IS CRITICAL TO THEIR ABILITY TO OBTAIN TIMELY JUSTICE AND VINDICATION OF THEIR CHILD'S	5
II. THE COURT'S OPINION SHOULD MAKE CLEAR THAT EVEN IN THOSE CASES WHERE THE REMEDY SOUGHT IS AVAILABLE UNDER THE IDEA FEDERAL COURT'S RETAIN AUTHORITY TO WAIVE THE EXHAUSTION REQUIREMENT WHERE EXHAUSTION IS FUTILE OR WOULD RESULT IN IRREPARABLE HARM	10
CONCLUSION	13

TABLE OF AUTHORITIES

Page(s)

Cases

Coit Independence Joint Venture v. FSLIC,
489 U.S. 561 (1989) 11

County Sch. Bd. of Henrico County v. R.T.,
433 F. Supp. 2d 692 (E.D. Va. 2006) 10-11

Heldman on Behalf of T.H. v. Sobol,
962 F.2d 148 (2d Cir. 1992) 12

Honig v. Doe,
484 U.S. 305 (1988) 11

J.G. v. Bd. of Educ. of Rochester City Sch. Dist.,
830 F.2d 444 (2d Cir. 1987) 12

Kominos by Kominos v. Upper Saddle River Bd. of Educ., 13 F.3d 775 (3d Cir. 1994) 11

Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist., 307 F.3d 1064
(9th Cir. 2002) 11-12

T.K. v. New York City Department of Education,
810 F.3d 869 (2d. Cir. 2016) 5, 7

Statutes

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29 U.S.C. § 794(a) ..... *passim*

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Benjamin Zablotsky, BA, Catherine P Bradshaw, PhD, MEd, Connie Anderson, PhD, Paul A. Law, MD, MPH, *The Association Between Bullying and the Psychological Functioning of Children with Autism Spectrum Disorders* 6

Danny Schoenbaechler, *Autism, Schools, and Service Animals: What Must and Should Be Done*, 39 J.L. & Educ. 455, 459-60 (2010) 9

H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985) 11

Laurie Tarkan, *Autism Therapy Is Called Effective, but Rare*, N.Y. TIMES, Oct. 22, 2002 Available at http://www.nytimes.com/2002/10/22/science/autism-therapy-is-called-effective-but-rare.html (accessed August 24, 2016) 10

Leslie C. Feller, *When Autistic Child's Growth Is at Stake*, N.Y. TIMES, Apr. 25, 1999 11

National Center for Education Statistics, Children and Youth with Disabilities, Percentage of distribution of children ages 3-21 served under the IDEA, Part B, by disability type: School year 2013-14. Available at http://nces.ed.gov/programs/coe/indicator_cgg.asp 3

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Autism Speaks, founded in 2005 by Bob and Suzanne Wright,[2] is today the world's leading not-for-profit autism science and advocacy organization dedicated to increasing awareness of autism spectrum disorders; funding research into the causes and personalized treatments for autism; developing resources for every stage of life; and, advocating on behalf of affected individuals and their families. Autism Speaks, under the auspices of its Global Autism Public Health Initiative, has established partnerships in more than 70 countries on five continents to foster international research, services, and awareness. Thus, Autism Speaks is able to provide partner countries with a wealth of information and training based on evidence-based and scientifically tested "best practices."

Autism Speaks works closely with federal, state, and local governments to meet the needs of the ever-growing population of children and adults with

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[1] Pursuant to this Court's Rule 37.6 we note that no part of this brief was authored by counsel for any party, and no person or entity other than Autism Speaks, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief was filed with the written consent of all parties.

[2] The Wrights founded Autism Speaks after becoming the grandparents of a child with autism. Bob Wright is the former vice chairman of General Electric and chief executive officer of NBC and NBCUniversal. Suzanne Wright passed away on July 30, 2016 after being diagnosed with pancreatic cancer. See www.autismspeaks.org.

autism and their families for access to effective treatment, services, and supports.

1 in 68 children are currently on the autism spectrum and, each year, 50,000 Americans with autism will transition into adulthood. Accordingly, it is essential that the autism population be properly and timely supported to increase the chances for greater independence and self-sufficiency in adulthood.

Autism Speaks can offer valuable insights into the special challenges faced by students with autism and their families and the potential impact of the Court's decision on thousands of families across the nation. The result advocated by the Respondent would jeopardize the ability of parents to timely pursue claims for violations of the Constitution, the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a), the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, and other Federal laws protecting the rights of children with disabilities who seek relief only available under these laws merely because the parents may also have been able to pursue different claims for violations of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. The ability of parents of children with autism to timely pursue relief available only under the Constitution, ADA, Section 504, and other Federal laws protecting the rights of children with disabilities is critical to children with autism for whom extended litigation under the IDEA's protracted procedures is particularly damaging.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than 6.5 million children receive special education services annually in public school systems in the United States.[3] Approximately 520,000 of these children, or 8%, have been diagnosed with a form of autism.[4] For these children and their parents, discrimination remains all too pervasive with long-lasting effects. Discrimination may often result in withdrawal, emotional disturbance and social isolation, all of which are devastating to a child with autism whose very condition is defined with reference to deficits in communication, social interaction, and behavior.[5]

While discrimination may naturally impact a child's education and give rise to rights to some forms of relief under the IDEA, plaintiffs who seek different relief under different statutes should not be required to pursue IDEA's protracted exhaustion procedures

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[3] *See* National Center for Education Statistics, Children and Youth with Disabilities, Percentage of distribution of children ages 3-21 served under the IDEA, Part B, by disability type: School year 2013-14. Available at http://nces.ed.gov/programs/coe/indicator_cgg.asp (citing U.S. Department of Education, Office of Special Education Programs, Individuals with Disabilities Education Act (IDEA) database, retrieved September 25, 2015, from http://www2.ed.gov/programs/osepidea/618-data/state-level-data-files/index.html#bcc.) (accessed August 23, 2016).

[4] *Id.*

[5] *See* American Psychiatric Association. (2013). Diagnostic and Statistical Manual of Mental Disorders (5th ed.), Autism Spectrum Disorder, p.50.

when the type of relief they seek is simply not available under the IDEA.

For those with developmental disabilities such as autism, every moment counts. Their window of opportunity can shrink quickly, and the damage to the child's development may never be reversed.

Given the long delays characteristic of the exhaustion process, it is particularly pernicious to impose IDEA's exhaustion requirement on claims that, by their plain terms, are not seeking relief that can be awarded under the IDEA. The statute language does not require this nor do the dispute resolution goals underlying the exhaustion requirement since the remedy sought is unavailable under the IDEA. Moreover, faced with such delays as a precondition to being able to reach a forum that can actually award the relief they seek, many struggling families with a child diagnosed with autism may see no choice but to forgo vindicating their rights. It is the parent, not the IDEA, that is truly exhausted.

Parents of children with autism or other disabilities may need or desire to seek relief that is *not* available under the IDEA but *is* available under, among other Federal laws, Section 504 and the ADA. They should not be hindered or delayed in vindicating their rights under the Constitution, ADA, Section 504, or other applicable federal laws, when they seek remedies unavailable under the IDEA merely because the violations of those laws occur while their children are at school or result in some measure of educational harm. Thus, Autism Speaks respectfully urges the Court to rule in favor of the Petitioners and reverse the judgment of the Sixth Circuit Court of Appeals. To provide complete guidance to the lower courts,

Autism Speaks further urges that the Court's opinion be carefully crafted so as to make clear that the well-established exceptions to the exhaustion requirement remain applicable in cases seeking relief which can be awarded under the IDEA. These exceptions continue to be critical to families for whom exhaustion of administrative proceedings would be futile or cause irreparable damage.

ARGUMENT

I. PARENTS' OPPORTUNITY TO AVAIL THEMSELVES OF RELIEF THAT IS AVAILABLE ONLY UNDER THE CONSTITUTION, ADA, SECTION 504, OR OTHER FEDERAL LAWS PROTECTING THE RIGHTS OF CHILDREN WITH DISABILITIES IS CRITICAL TO THEIR ABILITY TO OBTAIN TIMELY JUSTICE AND VINDICATION OF THEIR CHILD'S RIGHTS

Parents who choose to pursue claims for their disabled children under, among other Federal laws, ADA or Section 504, seeking remedies that are unavailable under IDEA, should be able to avail themselves of the federal courts immediately, saving years of expensive, unnecessary litigation. The recent 2016 decision of the Second Circuit in *T.K. v. New York City Department of Education*, 810 F.3d 869 (2d. Cir. 2016) is instructive here. The *T.K.* case demonstrates how the exhaustion requirement can result in years of protracted litigation, delaying the vindication of parents' and children's civil rights. The *T.K.* case focused on the experience of one public school student ("L.K.") being viciously bullied for two consecutive school years, her parents' repeated but wholly unsuccessful efforts to get school

administrators to even acknowledge that there was any bullying going on, the student's unfortunate 2008 withdrawal from the public school system and subsequent placement in a state-approved private school, and the relatively limited tuition reimbursement relief that the administrative hearing officer was empowered to order.[6]

L.K. was classified as "learning disabled" on her IEP. While L.K. was still attending public school at P.S. 6 in Manhattan, L.K. and her parents repeatedly attempted to discuss the bullying problem with school administrators, including P.S. 6 Principal Lauren Fontana. L.K.'s parents unsuccessfully attempted to initiate such discussions in the Principal's office, at L.K.'s IEP meeting, and on other occasions. The parents also sought to obtain a half dozen incident reports concerning L.K. to which P.S. 6 had referred. Each and every time, L.K.'s parents were rebuffed and stonewalled by Principal Fontana.[7]

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[6] Nearly 70 percent of children with autism spectrum disorder (ASD) experience emotional trauma as a result of being bullied. *See* Benjamin Zablotsky, BA, Catherine P Bradshaw, PhD, MEd, Connie Anderson, PhD, Paul A. Law, MD, MPH, *The Association Between Bullying and the Psychological Functioning of Children with Autism Spectrum Disorders*, 34 J. Dev. & Behavioral Pediatrics 1 (2013).

[7] Principal Fontana's disrespectful resistance continued even after L.K.'s parents filed their first appeal in the federal district court. Principal Fontana had to be ordered to appear for deposition and when she was finally under oath and asked about the incident reports that L.K.'s parents had made written requests to secure, Principal Fontana referred to those reports as the "f**king incident reports."

The New York City Department of Education's plan for 2008-2009 was to *return* L.K. to her class at P.S. 6, with the very *same* bullies who had tormented her for the two prior school years. L.K.'s parents were themselves products of the public school system, and they wanted the same experience for their daughter. However, faced with Principal Fontana's repeated stonewalling on the subject of bullying and an IEP plan that virtually guaranteed another year of bullying with absolutely no respite in sight, L.K.'s parents had no choice but to withdraw her from public school, place her in a state-approved private school, and bring an administrative proceeding under the IDEA to secure *Burlington/Carter* tuition reimbursement.

The case proceeded for nearly eight years through two separate administrative trials, two separate administrative appeals, and two appeals to the United States District Court for the Eastern District of New York. For years, until the very last phases of the litigation, the New York City Department of Education had denied flatly that there was any bullying of L.K. or any "stonewalling" of her parents. It was not until L.K.'s senior year in high school that the Second Circuit ruled that she had been bullied for two school years and that her parents had, in fact, been "stonewalled" by school administrators.

In *T.K.*, the student at least had the option to withdraw from public school and transfer to a private school that her parents had the resources to fund while the suit was pending. The child had both the means and the opportunity to escape from the hostile environment that was P.S. 6. What, however, would have happened had L.K. lived in a town without an available private school alternative that her parents

could afford? Under those circumstances, L.K. would have had no other opportunity but to stay and litigate while remaining at P.S. 6. That is where the exhaustion doctrine would be invoked and applied, causing further harm to L.K. and other students who might be targeted for bullying.

If the Court adopts Petitioners' position, parents who cannot afford to remove their children from hostile environments will, without question, be able to more timely seek relief under ADA or Section 504, among other federal laws, that is not available under the IDEA. For example, had L.K.'s parents lacked the means to remove her, under Petitioners' position, they could have filed an action in federal court under ADA or Section 504 seeking a declaratory judgment that the school district violated such laws and monetary damages against the school district for discrimination. Had L.K.'s parents been able to do so (without having such claims dismissed on exhaustion grounds), the school district might have felt compelled to be accountable early on—to discuss and address the bullying problem—rather than force the student and her parents to slog through a seven-year litigation saga while the school district continued to defend the indefensible. Autism Speaks urges that the maintenance of those additional claims could easily have changed the dynamics of non-accountability and utter disrespect demonstrated by P.S. 6's administration throughout the litigation.

It is essential that the Court provide lower courts with an unequivocal statement that if a child with a disability is seeking relief that *cannot* be obtained under the IDEA or any other statute with similar provisions, exhaustion of an administrative proceeding is not required to seek such relief. This is

particularly important for children with autism who cannot afford to languish for months or years while administrative proceedings are being exhausted. For example, if a school district prohibited an autistic child's service dog from accompanying the child to school, claiming that the dog did not qualify as a service animal, the parents should not be confined to seeking relief under IDEA merely because the child needs the service dog in school. Such litigation could take years to resolve, potentially leaving the child in school without the necessary service dog and risking regression.[8] Those same parents should have the option of seeking more timely relief in federal court by filing an action seeking a declaratory judgment that the dog qualifies as a service animal under the ADA. Such relief is unavailable under the IDEA, yet such litigation could vindicate the rights of the parents and child in a more timely fashion.

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[8] Service dogs trained to assist children with autism can help those who struggle with impulsive running, pica, self-stimulation, self-harming, mood swings, and many other issues. Danny Schoenbaechler, *Autism, Schools, and Service Animals: What Must and Should Be Done*, 39 J.L. & Educ. 455, 459-60 (2010).

II. THE COURT'S OPINION SHOULD MAKE CLEAR THAT EVEN IN THOSE CASES WHERE THE REMEDY SOUGHT IS AVAILABLE UNDER THE IDEA FEDERAL COURT'S RETAIN AUTHORITY TO WAIVE THE EXHAUSTION REQUIREMENT WHERE EXHAUSTION IS FUTILE OR WOULD RESULT IN IRREPARABLE HARM

Even as to cases where sought after relief is available under IDEA, case law has carved out important exceptions to the general rules requiring exhaustion. To provide appropriate guidance to the lower courts, Autism Speaks urges that the in rendering its opinion, the Court make clear that even in those cases where the particular remedies sought are available under the IDEA, and exhaustion would typically be required, the well-established common law exceptions to the exhaustion requirement remain fully applicable.

Exceptions to the exhaustion requirement are particularly important for children with autism. For these children and their parents, "every moment counts." *See* Laurie Tarkan, *Autism Therapy Is Called Effective, but Rare*, N.Y. TIMES, Oct. 22, 2002[9] (describing the "horrible feeling of time slipping away and nothing being done" when parents of children with autism do not have access to appropriate treatment); *see also County Sch. Bd. of Henrico County v. R.T.*, 433 F. Supp. 2d 692, 696 (E.D. Va.

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[9] Available at http://www.nytimes.com/2002/10/22/science/autism-therapy-is-called-effective-but-rare.html (accessed August 24, 2016).

2006) ("a critical window of developmental opportunity was closing" for a child who was not receiving an adequate public education). "Children with autism can't afford to waste a second." Leslie C. Feller, *When Autistic Child's Growth Is at Stake*, N.Y. TIMES, Apr. 25, 1999 (internal quotation omitted). At some point, justice delayed results in justice denied.

The exhaustion requirement is not a rigid one. This Court has upheld decisions excusing administrative exhaustion based on futility; that is, exhaustion would be futile because the administrative procedures do not provide an adequate remedy. *See Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("[a]dministrative remedies that are inadequate need not be exhausted."); *Honig v. Doe*, 484 U.S. 305, 327 (1988) ("parents may bypass the administrative process where exhaustion would be futile or inadequate"). Courts of Appeal have also recognized exceptions to the exhaustion requirement where: the issue presented is a purely legal question; the administrative agency cannot grant relief (for example, due to lack of authority), and; an emergency situation, such as where exhaustion of administrative remedies would cause "severe or irreparable harm" to the litigant.[10] *See Kominos by Kominos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778-79 (3d Cir. 1994); *See also Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1069-70 (9th

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[10] The last exception finds support in the legislative history of the predecessor to the IDEA, the Disabilities Education Act, which states that exhaustion would not be necessary when "an emergency situation exists (e.g., the failure to take immediate action will adversely affect a child's mental or physical health)." H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985).

Cir. 2002) (holding that exhaustion of California's due process procedures enacted to comply with the procedures set forth in IDEA by parents of autistic child bringing complaint seeking enforcement of a final decision of California's Special Education Hearing Office (SEHO) would be futile or inadequate, and thus parents would be allowed to bring their claim directly to court, as the SEHO lacked jurisdiction to enforce its own orders); *Heldman on Behalf of T.H. v. Sobol*, 962 F.2d 148, 158 (2d Cir. 1992) (action challenging New York regulations permitting boards of education to appoint hearing officer to review child's individualized education plan fell within futility exception to IDEA exhaustion requirement because regulation implemented New York statute, thus neither New York Commissioner of Education nor assigned hearing officer had authority to alter statutory procedure); *J.G. v. Bd. of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444, 446–47 (2d Cir. 1987) (class action brought under Education of All Handicapped Children Act, to compel compliance with federal and state law governing identification, evaluation and placement of handicapped students, fell within established exception to doctrine of exhaustion of administrative remedies; claims were systemic in nature and litigation went far beyond and accomplished more than could have been accomplished through administrative hearings).

CONCLUSION

For the foregoing reasons, *amicus curiae* Autism Speaks respectfully requests that the Court reverse the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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